NADARAJA MUTHU & ORS

v.

PALANISAMY RAMASAMY

HIGH COURT MALAYA, KUALA LUMPUR
VINCENT NG J
[ORIGINATING SUMMONS NO: D1-24-194-2002]
13 FEBRUARY 2003

COMPANY LAW: *Disposition of property - Transfer of shares - Winding-up - Whether would alter status of members - Companies Act 1965 s. 223*

The plaintiffs, who obtained two summary judgments against the defendant, took out an application for charging orders in respect of shares in two companies (Biografik and Inalap). These shares were registered under the defendant's name. A charging order absolute was thereafter granted in respect of the Biografik shares and the defendant's appeal against the order was dismissed. Subsequently, the plaintiffs applied for an order of sale of the shares that were subject to the charging order and for the proceeds arising therefrom to be utilised towards satisfaction of two judgment debts due and owing by the defendant.

The defendant's objection in respect of the Biografik shares was based on s. 223 of the Companies Act 1965 ('the Act'), in that, in the light of the fact that the alleged winding-up petition against Biografik commenced prior to the instant application, any transfer of the Biografik shares would be an alteration in the status of the members of the company.

Held (allowing the application):

[1] Section 223 of the Act applied to creditors of the company and its true purpose is to protect the property of the company for equal distribution amongst the unsecured creditors of the company. The true intention of the section is to safeguard the company's property and not that of the individual shareholders. (p 406 d)

[2] The sole test to determine whether the execution of the charging order is caught within s. 223 is to ask whether such execution would affect the property of the company through effecting improper alienation or dissipation of its property. (p 406 e)

[2a] The words 'disposition of property of the company' ought to be read conjunctively with the phrase 'and any transfer of shares or alteration in the status of the member of the company' in s. 223. It follows that the transfer of shares which do not entail or involve disposition or dissipation of the company's property do not come within the purview of s. 223. (p 406 e-f)

[3] In any event, there was no evidence that there was in actual fact a winding up petition against the company. (p 407 f)

Case(s) referred to:

Abdul Aziz Atan v. Ladang Rengo Malay Estates Sdn Bhd [1985] 2 MLJ 165 ***(refd)***

Arab Malaysia Merchant Bank Bhd v. Orient Apparel Bhd & Ors [2001] 4 CLJ 572 HC ***(cit)***

Denney v. John Hudson & Co Ltd [1992] BCLC 901 ***(cit)***

Kimoyama Elektrik (M) Sdn Bhd v. Metrobilt Construction Sdn Bhd [1990] 2 CLJ 795; [1990] 2 CLJ (Rep) 253 HC ***(cit)***

Re A1 Levy Holdings Ltd [1964] 1 Ch 19 ***(refd)***

Re Overseas Aviation Engineering (BG) Ltd [1962] 3 All ER 12 ***(refd)***

Re Wiltshire Iron Company ex parte Pearson [1868] 3 Ch App 443 ***(foll)***

Legislation referred to:

Companies Act 1965, s. 223

Companies Act 1948 [UK], s. 227

For the plaintiffs - Trevor De Silva; M/s Shook Lin & Bok
For the defendant - S.S. Tugal; M/s SS Tugal & Assocs

Reported by Mariette Peters-Goh

JUDGMENT

Vincent Ng J:

Preamble

Enclosure 1 is the plaintiffs' application for, *inter alia*, an order for sale of shares subject to two charging orders absolute dated 8 February 2001 and 10 August 2001 respectively and that the proceeds arising therefrom be utilised towards satisfaction of two judgment debts due and owing by the defendant.

Background

In order to fully appreciate the circumstances that led to this application, it is necessary to review the history of these proceedings. Briefly it is as follows.

Vide Civil Suit No: D1-22-1438-99, the plaintiffs obtained two summary judgments against the defendant dated 23 March 2000 and 16 June 2000 respectively for a total sum of RM4,000,000 (the judgments).

It is noteworthy that defendant did not appeal against the judgments so entered against him nor did he seek to stay the same.

In an attempt to execute the judgments, the plaintiffs took out an application for charging orders in respect of 2,660,002 shares in Biografik (M) Sdn Bhd (Biografik shares) and 100,001 shares in Inalap International Sdn Bhd (Inalap shares). At all material times, the shares were registered under the defendant's name.

A consent charging order absolute was recorded in respect of the Inalap shares whereas the learned Senior Assistant Registrar (SAR) granted the charging order absolute in respect of the Biografik shares after extensive submissions from both sides.

Needless to say, the defendant filed an appeal against the decision of the learned SAR, which has since been dismissed.

Hence, this instant application to execute upon the judgments.

Sole Point Of Law

The defendant did not file any affidavit opposing the application but sought instead to rely on a sole point of law.

It is pertinent to note that the defendant's objection (as was the case during the charging order stage) was only in respect of the Biografik shares.

The sole ground of the defendant's challenge to the plaintiffs' application was founded on s. 223 of the Companies Act 1965 (the Act) which reads as follows:

> Any **disposition of property of the company** including things in action **and any transfer of shares or alteration in the status of the members of the company made after the commencement of winding** up by the Court shall **unless the Court order otherwise be void**. (emphasis added)

It was the defendant's contention that in light of the alleged couple of winding up petitions against Biografik (M) Sdn Bhd commenced prior to this instant application, any transfer of Biografik shares would be an alteration in the status of the members of the company. And, that s. 223 of the Act comes into play, as the plaintiffs failed to secure the benefits of the charging orders before the commencement of the winding up. Further, the defendant argued that it was only opened to the winding up court to make an order under s. 223 of the Act.

In essence, it was the argument of the defendant that to allow this application would be to allow a violation of s. 223 of the Act.

Despite the defendant's attempt to blur the distinction between the company and its shareholders, it is trite law that the shareholder of a company is a distinct and separate legal entity from the company in which he holds shares (see *Abdul Aziz bin Atan & Ors v. Ladang Rengo Malay Estates Sdn Bhd* [1985] 2 MLJ 165 at 167).

The plaintiffs' application is for recovery of two money judgments against a defendant by means of charges against his personal property, which although is in the form of company shares, has nothing to do with the company itself. In other words, the plaintiffs are the creditors of the shareholder, not the company.

It is also trite law that s. 223 of the Act applies to creditors of the company and its true purpose is to protect the property of the company for equal distribution amongst the unsecured creditors of the company in question. The true intention of the section is to safeguard the company's property and not that of its individual shareholders. In my considered view, the sole test to determine whether execution of the charging order in the instant case is caught within s. 223, is to ask whether such execution would affect the property of the company through effecting improper alienation or dissipation of its property. Thus, I would hold that the words 'disposition of property of the company' oughtly logically be read conjunctively with the phrase 'and any transfer of shares or alteration in the status of member of the company' in s. 223. It would follow that transfer of shares which do not entail or involve disposition or dissipation of the company's property do not come within the purview of s. 223.

This has been clearly elucidated by Lord Cairns LJ in *Re Wiltshire Iron Company ex parte Pearson* [1868] 3 Ch App 443, when he considered the English equivalent of our s. 223:

> [Section 153] no doubt provides that all dispositions of the property and effects of the company made between the commencement of the winding up (that is the presentation of the petition) and the order for winding up, shall, unless the court otherwise orders, be void. This is a wholesome and necessary provision, to prevent, during the said period which must elapse before a petition can be heard, the improper alienation and dissipation of **the property of the company** in extremis ... (emphasis added)

In a subsequent case, *Re AI Levy (Holdings) Ltd* [1964] 1 Ch 19, Buckley J opined, at p. 27, that the object of s. 227 of the Companies Act 1948 (which is similar to s. 173 of the Companies Act 1920):

> ... is to protect the interests of creditors from the possible unfortunate results which would ensue from the presentation of a petition, and to protect their interests as much during the period while the petition was pending as after an order has been made on it. What the section provides in its present terms is that any disposition of the property of the company made after the commencement of the winding up shall be void in the winding up of the company unless the court otherwise orders …

(See also *Kimoyama Elektrik (M) Sdn Bhd v. Metrobilt Construction Sdn Bhd* [1990] 2 CLJ 795; [1990] 2 CLJ (Rep) 253 HC; *Denney v. John Hudson & Co Ltd* [1992] BCLC 901 and *Arab Malaysia Merchant Bank Bhd v. Orient Apparel Bhd & Ors* [2001] 4 CLJ 572.)

Conversely, the defendant's unconventional interpretation of s. 223 of the Act is unsupported by any case law. Reliance on *Re Overseas Aviation Engineering (GB) Ltd* [1962] 3 All ER 12 is clearly flawed as Lord Denning's judgment starts out by identifying that:

> The facts are simple. On Aug 16, 1961 Jarvis & Sons, Ltd obtained **a judgment against Overseas Aviation, Ltd** for … . (emphasis added)

Clearly, the case essentially concerned an attack against the subject company's property rather than its shareholders' property.

The Application

Lastly, the defendant was faced with another impediment which he was unable to hurdle. Aside from the say-so of the defendant's solicitor, there was no evidence before this court that there actually was any winding up petition against Biografik (M) Sdn Bhd.

The conclusion

Interesting as the defendant's submission was, I found it merely to be an attempt to delay the plaintiffs enjoying the fruits of their judgments. I therefore allowed the plaintiffs' application in encl. 1 prayers (1) to (7).